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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Michael Paparella,

No. CV-22-02040-PHX-JJT

Plaintiff,

ORDER

V.

Plume Design Incorporated, *et al.*,

Defendants.

At issue is Defendant Plume Design Incorporated’s Motion to Dismiss or, in the Alternative, Transfer under Federal Comity, Federal Rule of Civil Procedure 12(b)(4), and 28 U.S.C. § 1404(a) (Doc. 5, MTD), to which Plaintiff Michael Paparella filed a Response (Doc. 10, Resp.) and Defendant filed a Reply (Doc. 11). The Court finds these matters appropriate for resolution without oral argument. *See* LRCiv 7.2(f). For the reasons that follow, the Court grants Defendant’s Motion to Dismiss.

I. BACKGROUND

There are two separate suits at issue. In both actions, Plaintiff alleges that after Defendant terminated his employment, Plaintiff was not paid commissions, bonuses, and unvested stock options to which he was entitled. (Doc. 1-1 at 14–18, Am. Compl.; MTD at 3, 4, 6, 8.)

The first suit was filed on February 9, 2022, in California Superior Court, County of Santa Clara. (MTD at 4.) The case was later removed to the District Court for the Northern District of California on March 1, 2022 (the “California Action”). (MTD at 4.)

1 The California Action originally consisted of eight claims: (1) breach of contract; (2) illegal
2 forfeiture; (3) wage waiting time penalties after termination under California Labor Code
3 § 203; (4) failure to pay timely wages during employment under California Labor Code
4 § 210; (5) age discrimination in violation of California’s Fair Employment and Housing
5 Act (“FEHA”); (6) age harassment in violation of FEHA; (7) failure to prevent
6 discrimination and harassment in violation of FEHA; and (8) wrongful termination. (MTD
7 at 4–5.) Plaintiff in the California Action argued that wages he was entitled to included
8 commissions, bonuses, and unpaid stock options. (MTD at 4–5.)

9 Defendant moved to dismiss all claims in the California Action under Federal Rule
10 of Civil Procedure 12(b)(6). (MTD at 5.) In Plaintiff’s Response to Defendant’s Motion to
11 Dismiss, Plaintiff argued for the application of California law pursuant to a California
12 choice of law and venue provision contained in the Proprietary Information and Inventions
13 Agreement (“PIIA”) that Defendant had incorporated into Plaintiff’s Employment
14 Agreement by reference. (MTD at 5.) On July 25, 2022, the Northern District granted in
15 part and denied in part Defendant’s motion to dismiss. (MTD at 5.) After finding that
16 Plaintiff had failed to show that California statutory law applied to him, the Northern
17 District dismissed Plaintiff’s FEHA and wage claims. (MTD at 5.) However, that court
18 found that Plaintiff’s common law claims—breach of contract and illegal forfeiture—were
19 governed by the choice of law and venue provisions in the PIIA. (MTD at 5–6.)

20 After an unsuccessful mediation on October 3, 2022, Plaintiff filed this action (the
21 “Arizona Action”) on October 17, 2022, in Arizona Superior Court, County of Maricopa,
22 and Defendant later removed it to this Court. (MTD at 6.) In the Arizona Action, Plaintiff
23 claims that Defendant violated A.R.S. § 23-353 by failing to pay him wages, including
24 commissions, referral fees, bonuses, and stock options. (Am. Compl. at 3.) Plaintiff asserts
25 that he is entitled to treble damages under A.R.S. § 23-355 and costs and attorney’s fees
26 under A.R.S. § 23-364(G) and A.R.S. § 12-341.01. (Am. Compl. at 3.) Defendant now
27 moves to dismiss the Arizona Action or, in the alternative, transfer the Arizona claims to
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1 the Northern District under the doctrine of federal comity, Federal Rule of Civil Procedure
 2 12(b)(4), and 28 U.S.C. § 1404(a). (MTD at 1.)

3 **II. LEGAL STANDARD**

4 “There is a generally recognized doctrine of federal comity which permits a district
 5 court to decline jurisdiction over an action when a complaint involving the same parties
 6 and issues has already been filed in another district.” *Pacesetter Sys., Inc. v. Medtronic, Inc.*,
 7 678 F.2d 93, 94–95 (9th Cir. 1982) (citation omitted). “Normally sound judicial
 8 administration would indicate that when two identical actions are filed in courts of
 9 concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit
 10 and no purpose would be served by proceeding with a second action.” *Id.* at 95. This is
 11 called the “first to file” rule. *Id.*

12 “The ‘first to file’ rule normally serves the purpose of promoting efficiency well
 13 and should not be disregarded lightly.” *Id.* (internal quotation omitted). “When applying
 14 the first to file rule, courts should be driven to maximize ‘economy, consistency, and
 15 comity.’” *Kohn L. Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th
 16 Cir. 2015) (quoting *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir.
 17 1999)).

18 When deciding whether to apply the first to file rule, district courts look to three
 19 factors: (1) chronology of the lawsuits; (2) similarity of the parties; and (3) similarity of
 20 the issues. *Kohn L. Grp.*, 787 F.3d at 1240. “However, [the] ‘first to file’ rule is not a rigid
 21 inflexible rule to be mechanically applied, but rather is to be applied with a view to the
 22 dictates of sound judicial administration.” *Pacesetter*, 678 F.2d at 95.

23 **III. ANALYSIS**

24 Defendant argues that all of Plaintiff’s claims in the Arizona Action should be
 25 dismissed or, in the alternative, transferred to the District Court for the Northern District
 26 of California pursuant to Federal Rule of Civil Procedure 12(b)(4) and 28 U.S.C. § 1404(a).
 27 (MTD at 1–2.) First, Defendant contends that Plaintiff’s claims should be dismissed or
 28 transferred under the first to file rule. (MTD at 7–9.) Second, Defendant asserts that

1 Plaintiff should be judicially estopped from opposing the dismissal or transfer. (MTD
 2 at 9-12.) Third, Defendant requests that the Court issue an Order to Show Cause regarding
 3 why Plaintiff and his counsel should not be sanctioned under Federal Rule of Civil
 4 Procedure 11 for filing the Arizona Action. (Reply at 7.) In Plaintiff's Response, he agrees
 5 with Defendant's alternative request to transfer the Arizona Action to the Northern District
 6 but contends that the claims should not be dismissed. (Resp. at 5.)

7 **A. The First to File Rule**

8 Defendant argues that all three factors analyzed under the first to file rule support
 9 the dismissal or transfer of Plaintiff's claims. (MTD at 7.) In his Response, Plaintiff only
 10 disputes the similarity of the issues between the two lawsuits. (Resp. at 5-6.) Plaintiff does
 11 not dispute that the California Action was filed before the Arizona Action and that the
 12 parties in both suits are identical, and the Court finds that the first two requirements of the
 13 first to file rule are met. Thus, the only factor to be analyzed is the similarity of the issues.

14 **1. The Issues in Both Lawsuits Are Substantially Similar**

15 In its Motion, Defendant argues that the issues in both the Arizona Action and the
 16 California Action are substantially similar because two issues are central in both actions:
 17 (1) Plaintiff's Employment Agreement and whether he is entitled to certain commissions,
 18 bonuses, and stock options under that agreement; and (2) the nature of Plaintiff's
 19 termination and whether its circumstances impact Plaintiff's alleged entitlements under the
 20 Employment Agreement. (MTD at 9.) On the other hand, Plaintiff contends that the issues
 21 are different because he never filed Arizona claims in the Northern District. (Resp. at 6.)

22 Under the first to file rule, issues between the two lawsuits only need to be
 23 substantially similar. *See Kohn L. Grp.*, 787 F.3d at 1240-41 (citation omitted). When
 24 analyzing if two lawsuits have substantially similar issues, the Court must determine
 25 whether there is "substantial overlap" between the issues. *Id.* at 1241.

26 The issues in both the Arizona Action and the California Action substantially
 27 overlap. Both lawsuits will require a court to determine whether Plaintiff is entitled to
 28 commissions, bonuses, and stock options under his Employment Agreement with

1 Defendant. Few issues, if any, are unique to the Arizona Action. Both suits involve the
 2 same facts and, in both, Plaintiff claims damages of unpaid commissions, bonuses, and
 3 stock options. For this reason, the third factor of the first to file rule is met.

4 **2. Dismissal Without Prejudice of the Arizona Action Is
 5 Appropriate Under the First to File Rule**

6 Once a court determines that the first to file rule applies, the District Court may
 7 transfer, stay, or dismiss the action. *C21FC LLC v. NYC Vision Cap. Inc.*, No. CV-22-
 8 00736-PHX-SPL, 2022 WL 2646168, at *2 (D. Ariz. July 8, 2022) (citing *Alltrade, Inc. v.*
 9 *Uniweld Prods., Inc.*, 946 F.2d 622, 623 (9th Cir. 1991)).

10 The proper procedure for Plaintiff to bring his claims in the California Action is by
 11 way of a motion to amend under Federal Rule of Civil Procedure 15, so the Court finds
 12 dismissal without prejudice of the Arizona Action is appropriate. *See Horner v.*
 13 *Youghiogheny Commc 'ns, L.L.C.*, No. CV 05-3800-PHX-NVW, 2006 WL 1328803, at *6
 14 (D. Ariz. May 12, 2006) (noting that a dismissal without prejudice is the practical
 15 equivalent of a transfer of venue). Since the Court finds that dismissal without prejudice
 16 under the first to file rule is appropriate in this case, the Court does not reach the merits of
 17 Defendant's other arguments.¹

18 **B. Sanctions Under Federal Rule of Civil Procedure 11**

19 In its Reply, Defendant asks the Court to issue an Order to Show Cause why Plaintiff
 20 and his counsel should not be sanctioned under Federal Rule of Civil Procedure 11 for their
 21 respective conduct in filing and maintaining the Arizona Action. (Reply at 7.) The Court
 22 does not find that Plaintiff's or his attorney's conduct rises to the level of sanctionable
 23 behavior. *See* Fed. R. Civ. P. 11(c)(3). For that reason, the Court declines Defendant's
 24 request to issue an Order to Show Cause under Rule 11.

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¹ Defendant also moves to dismiss under Federal Rule of Civil Procedure 12(b)(4), but it is unclear to the Court how that rule is implicated here.

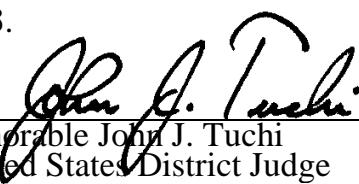
1 **IV. CONCLUSION**

2 For the reasons stated above, the Court grants Defendant's Motion to Dismiss under
3 the first to file rule and declines to issue an Order to Show Cause under Federal Rule of
4 Civil Procedure 11.

5 **IT IS THEREFORE ORDERED** granting Defendant's Motion to Dismiss
6 (Doc. 5). All counts are dismissed without prejudice.

7 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment
8 and close this case.

9 Dated this 10th day of March, 2023.

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11 _____
12 Honorable John J. Tuchi
13 United States District Judge

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